LIBRARY
SUPREME COURT, U. S.

No. 1004

Office-Supreme Court, U.S.
FILED
FEB 6 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

STARLING GENE HELM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1004

STARLING GENE HELM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of wilfully failing to report for induction as ordered, in violation of 50 U.S.C. App. 462. On June 12, 1967, he was sentenced to two years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

The evidence showed that petitioner registered with his local Selective Service board in December 1958 and

was classified 1-A in July 1959. In October 1963 he was reclassified 2-S and on March 14, 1966, having completed his school requirements, he was again placed in class 1-A (Tr. 7-9, 23). On June 16, 1966, after having had a physical examination and been declared acceptable, petitioner returned a current information questionnaire, but did not claim to be a conscientious objector (Tr. 11-12). On June 27, 1966, petitioner was ordered to report for induction on July 28, 1966 (Tr. 13). On July 12, 1966, he was notified that pursuant to his request for an interview he should appear before the local board on July 18, 1966 (Tr. 14). On the appointed day, petitioner came before the board and tendered a letter, which stated (Tr. 15):

> I am farming now and have been doing so for the past several years . . . . I have no one to take it over; I am the only son in family. My people depend on me to help them carry on their home. I am conscientious objector to war, to aid it in any way.

Petitioner did not give any reasons for his claim, either orally or in writing (Tr. 15). On July 19, 1966, the local board sent a letter to petitioner advising him that, on the basis of the information he had presented, they declined to reopen his classification (D. Exh. 2, 41).

On July 22, 1966, the clerk, believing that petitioner had possibly not explained his reasons for his claim to the local board, mailed the special form for conscientious objectors to petitioner (Tr. 16). Petitioner returned the form on July 26, 1966. His answers to

the questions asking for an explanation of the source and nature of his beliefs were "From reading Bible" and "I believe the Bible." He replied "None" to the question asking in what circumstances he believed in the use of force. He stated that he had never given public expression to the views relied on as the basis for his conscientious objector claim (Tr. 16-18; Govt. Exh. 1, 48). On the day on which petitioner returned the form (July 26, 1966), the local board, after reviewing it, notified him that it had met and determined that there was insufficient evidence to justify reopening his classification and that he was expected to report for induction on July 28, 1966 (Tr. 19). Petitioner did not report (Tr. 21, 57).

1. It is clear from the facts that petitioner was afforded full opportunity to present information to his local board to substantiate the conscientious objector claim which he made for the first time after receipt of his induction notice. The information which he provided, however, was plainly insufficient to warrant a finding that there had "been a change in [petitioner's] status resulting from circumstances over which [he] had no control." 32 C.F.R. 1625.2. The refusal to reopen his classification was thus proper. *E.g.*, *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *United States* v. *Al-Majeid Muhammud*, 364 F. 2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Yancey*, 368 F. 2d 816 (C.A. 2).

Some courts of appeals have held that a conscientious objection which "crystallizes" after receipt of a

notice of induction may be a change of status over which a registrant has no control and, thus, that such a claim must be considered even if presented after notice of induction. *E.g.*, *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2), No. 564, this Term, certiorari denied, November 13, 1967. Here petitioner's claim was in fact considered by the local board after notice of induction but was properly found to be without substantiation.

2. Petitioner testified at the trial that on March 15, 1966 (after being placed in class 1-A, but before his physical examination) he went to his local board and told the clerk that he desired an appearance before the board, but the clerk said that there was nothing she could do (Tr. 42, 61). The clerk testified that she could not remember petitioner's coming to her and requesting an appeal or a hearing (see Tr. 23, 24, 65). She recalled that on March 23, 1966, petitioner did come to her and request an explanation for the reclassification, which she furnished (Tr. 64-65).

Petitioner contends that he was denied due process because the clerk did not, in March, advise him of his right to see a government appeal agent. Even assuming an obligation on the part of the clerk to do so, no prejudice resulted since petitioner had not even asserted a claim of conscientious objection at the time.[1] It is well settled that mere irregularities in the admin-

[1] As noted above petitioner did not assert such a claim on the current information form which he submitted on June 16, 1966, some three months after his alleged conversation with the clerk.

istration of the Selective Service Act will not provide a defense in the absence of a showing of prejudice. See *Pate* v. *United States*, 243 F. 2d 99, 104 (C.A. 5); *United States* v. *Wolfe*, 172 F. Supp. 343 (E.D. Mich.), affirmed, 256 F. 2d 434 (C.A. 6); *United States ex rel. Lipsitz* v. *Perez*, 372 F. 2d 468, 469 (C.A. 4).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

FEBRUARY 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 286628 567